Supreme Court, U.S.
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No. 99-772

IN THE

Supreme Court of the United States

JOHN DOE and RICHARD SMITH,

Petitioners,

v.

MUTUAL OF OMAHA INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent Mutual of Omaha Insurance Company ("Mutual") opposes a grant of *certiorari* in this case, alleging that no circuit split exists that warrants review. In fact, the circuits are in conflict both on the central issue whether Title III of the Americans with Disabilities Act ("ADA" or "Act") ever reaches unjustified, disability-based limits on insurance coverage, and on the proper interpretation of the McCarran-Ferguson Act ("MFA"). Two recent decisions deepen these conflicts. *See Pallozzi v. Allstate Life Ins. Co.*, 1999 WL 1079973 (2d Cir. Dec. 1, 1999); *Leonard F. v. Israel Discount Bank*, 1999 WL 1114700 (2d Cir. Dec. 8, 1999). Mutual also ignores conflicts between the Seventh Circuit's opinion and decisions of this Court prohibiting coverage distinctions that, like Mutual's AIDS caps, result in disparate treatment based solely on disability, *see* Petition for a Writ of Certiorari ("Petition") at 22-25, and holding that the MFA does not bar enforcement of federal laws that specifically relate to the business of insurance. *Id.* at 28-29.

I. There is a Genuine Circuit Conflict Over Title III's Application to Insurance Coverage.

Mutual has admitted that its AIDS caps do not comply with state law and that coverage for the exact same treatments provided others is denied policyholders with HIV or AIDS based solely on their disabilities. *See* Petition at 6-7. These facts state a claim of discrimination under the statutory reading of Title III by the First and Eighth Circuits on parallel claims, and under the Second Circuit's reading of Section 501(c) of the Act in two new opinions. Yet the Seventh Circuit, in substantial accord with the Third and Sixth Circuits, held that Mutual's admittedly unjustified AIDS caps escape review. This case presents the ideal opportunity to end the deepening conflict on the threshold legal issue whether Title III ever reaches disability-based insurance coverage distinctions.

The decisions of the Third and Sixth Circuits that Mutual relies on expressly declare the existence of a split. *See* Petition at 16-17. While the First Circuit allowed an AIDS cap claim to proceed and held that denial of physical access to a place or its goods and services is not a prerequisite to a Title III claim, the Third and Sixth Circuits "disagree with" and "part company with" the First Circuit. *Id.*[1] Mutual glosses over this fundamental conflict.

The Third, Sixth, and Seventh Circuits also split from the Eighth Circuit, which has held that Title III reaches disability-based insurance coverage distinctions. *See Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960 (8th Cir. 1995). Mutual provides no substantive response to *Henderson* beyond the unsupported claim that Petitioners "misrepresent" the case. Opposition to Petition for Writ of Certiorari ("Opp. Cert.") at 18 n.8. Yet, as even Mutual admits, *Henderson* held that a plaintiff who is denied coverage on the basis of disability for treatments an insurer otherwise would cover states a Title III claim on which she is likely to succeed. *Id.* Neither the Eighth Circuit nor any court in that circuit has departed from this holding.

The Seventh Circuit charts a course between the decisions of these other circuits. By taking an intermediate position — holding that some review of the terms of insurance coverage is necessary and permissible under the ADA[2] but that AIDS caps

1. Citing *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1013 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 850 (1999); *see also Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457 (6th Cir. 1998) (denying plaintiffs' claim because she was not denied access to or "at" a place of public accommodation).

2. *See* App. 10a-11a (a coverage term "obviously designed to deter people with AIDS from buying the policy (such as refusing to cover such a person for a broken leg)" would violate the ADA).

escape scrutiny — the Seventh Circuit's decision compounds the confusion. Indeed, Mutual's assertion that no circuit will review the "content" of insurance policies under the ADA, *see*, *e.g.*, Opp. Cert. at 9-10, is not true even as to the Seventh Circuit, which holds that content is reviewable for some forms of discrimination.

The circuit conflict has only deepened since the filing of the Petition. Two recent Second Circuit decisions hold that Section 302(a) of the Act reaches discriminatory insurance practices that fall outside Section 501(c), the statutory safe harbor.[3] In *Pallozzi*, the Second Circuit considered the "underwriting" decision not to sell insurance. Underwriting decisions are among the insurance practices referenced in Section 501(c) of the Act. *See* n.3, *supra*. The court of appeals held that the plain language of Title III — including its "full and equal enjoyment" language — reaches insurance practices not exempted by Section 501(c), 1999 WL 1079973 at *4, and rejected the insurer's argument that Title III is limited to physical access:

> The exemption for insurance underwriters whose practices are "not inconsistent with State law" strongly implies that the Act is intended to reach insurance underwriting practices that are inconsistent with State law. If the ADA were not intended to reach insurance underwriting under any circumstances, there would be no need for a safe harbor provision exempting underwriting practices that are consistent with state law.

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3. Section 501(c), 42 U.S.C. § 12201(c), provides a safe harbor for certain risk-based insurance practices. Sections 501(c)(1) and (2) allow for "underwriting," "classifying," or "administering" risks, and for establishing or administering plans "that are based on or not inconsistent with State law" and not otherwise an attempt "to evade the purposes of [the ADA]."

Id. at *3. The Second Circuit recognized the careful balance struck by Congress in Section 501(c):

> Although the safe harbor provision generally exempts insurance underwriters from the reach of Titles I through III so long as they comply with state law, Congress clearly contemplated that under some circumstances — when the conditions of the safe harbor were not met — Titles I through III would apply to insurance underwriting practices, including the relation of insurers to those applying to become their insureds.

Id. at *6.

Accordingly, although it has not reached the precise issue in this case, the Second Circuit holds that an "actionable claim under the ADA" is stated where "the insurance practice complained of is not consistent with state law or is being used as a 'subterfuge to evade the purposes' of Titles I and III of the Act." *Id.* at *8; *see also Leonard F.*, 1999 WL 1114700 at *4 ("The plain meaning of Section 501(c) is that insurers are exempt from regulation under the ADA so long as (i) their actions conform to state law, and (ii) they do not use the exemption as a 'subterfuge to evade the purposes of [the Act].' ") (brackets in original).[4]

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4. *Leonard F.* involved a plaintiff's Title III challenge to a disparity in plan coverage for mental and physical disabilities. Unlike Mutual's AIDS caps, the coverage limit in *Leonard F.* was found to comply with state law, 1999 WL 1114700 at *7, and the Second Circuit therefore considered whether it might constitute "subterfuge" under Section 501(c). Because the court resolved the *Leonard F.* appeal based on the district court's failure to properly apply the "subterfuge" language in Section 501(c), an issue not presented here, it expressed no view on the Seventh Circuit's decision in this case. *See id.* at *8 n.8. Mutual has waived any defenses under Section 501(c) in this case. *See* App. 23a.

Mutual admits that the insurance policies it has underwritten for Petitioners treat the class of policyholders with HIV or AIDS differently and less favorably than all other policyholders in a manner prohibited by state law. *See* Petition at 6-7. Thus, Petitioners' claim against Mutual could proceed in at least three circuits, but would be dismissed in three others. That the outcome of an ADA claim in the federal system might hinge solely on where a plaintiff brings her case evinces an intolerable level of conflict among the lower courts.

This case presents the ideal opportunity to end this conflict. Because of the parties' stipulations, and as Mutual agrees, this case presents only "controlling legal issues" for review. Opp. Cert. at 6-7. The complete lack of justification for AIDS caps not only was stipulated by Mutual, but independently proven by Petitioners.[5] The District Court's judgment simply reflects the reality that the cost of treating HIV and AIDS is comparable to that for other severe medical conditions, and a ruling that the ADA reaches this unjustified insurance practice likely will end it.[6]

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5. Mutual offers a revisionist history of the final judgment and discovery in this case to explain away its own stipulations. These arguments and discovery complaints were previously considered and rejected by the District Court, which sanctioned Mutual's counsel for failure to comply with discovery. *See* R. 42. When informed that its Rule 26 disclosures did not support the AIDS caps, Mutual's primary concern was not the alleged burden of discovery, but avoiding a factual finding at odds with certifications to state insurance regulators. *See* R. 34, Ex. D at 7-11, 15-16. That concern more plausibly explains Mutual's actions in withholding discovery and agreeing to stipulations.

6. *See* Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* in support of Petitioners of the Infectious Diseases Society of America; National Alliance of State and Territorial AIDS Directors; National Association of Public Hospitals and Health Systems; American Nurses Association; HIV Quality Care Network; and American Public Health Association, No. 99-772, filed December 2, 1999 at 17-19; *see also Petition* at 9 n.4.

II. The Seventh Circuit's McCarran-Ferguson Act Ruling Merits Review Because it Conflicts with Decisions of This Court and Those of Other Circuits.

The Seventh Circuit's holding that the McCarran-Ferguson Act insulates insurance practices from ADA scrutiny — even though the ADA "specifically relates to the business of insurance" — conflicts with *Barnett Bank v. Nelson*, 517 U.S. 25, 38 (1996) ("By its terms, . . . the [MFA] does not apply when the conflicting federal statute 'specifically relates to the business of insurance.'"). Mutual ignores this fundamental conflict warranting review.[7] Moreover, contrary to Mutual's arguments, Opp. Cert. at 23-24, there is now explicit conflict among the circuit courts. *Compare Pallozzi*, 1999 WL 1079973 at *6 ("[a]pplying the analytic framework of *Barnett Bank* to this case leads us to conclude that the ADA does 'specifically relate to the business of insurance,' and therefore falls outside the scope of McCarran-Ferguson's prohibition") *with* App. 13a-14a (applying MFA to bar Petitioners' ADA claim despite holding that the ADA specifically relates to the business of insurance).

The MFA is an important federal statute and its proper interpretation has merited this Court's attention several times in recent terms.[8] By failing even to acknowledge *Barnett Bank*, let alone to follow it, the Seventh Circuit undoes the Court's

7. The Court has often granted review in cases of stark conflict between its holdings and those of lower courts. *See, e.g., Flippo v. West Virginia*, __ U.S. __, 120 S. Ct. 7 (1999) (per curiam); *Texas v. Lesage*, No. 98-1111, 1999 WL 1067047 (U.S. Nov. 29, 1999) (per curiam).

8. *See, e.g., Humana Inc. v. Forsyth*, 525 U.S. 299, __, 119 S. Ct. 710, 716 (1999); *Barnett Bank*, 517 U.S. at 38, 40-42 (1996); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 98 (1993); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 779 & n.8 (1993); *United States Treas. Dept. v. Fabe*, 508 U.S. 491, 507-08 & n.7 (1993).

efforts at uniformity, presenting a stark conflict that merits review and reversal.

Mutual does not dispute that the ADA specifically relates to the business of insurance.[9] Rather, it passes over this decisive factor, which exempts the ADA from the MFA, and praises the Seventh Circuit's application of the MFA as consistent with *Humana Inc. v. Forsyth*, 525 U.S. 299, 119 S. Ct. 710 (1999). In *Humana*, however, the Court considered whether RICO impairs state insurance regulation only because RICO does not specifically relate to the business of insurance. 119 S. Ct. at 715.[10]

The Seventh Circuit's MFA decision conflicts with controlling precedent of this Court and is utterly unsupportable on the stipulated factual record in this case. It merits review and reversal.

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9. The Second and Seventh Circuits hold that the ADA specifically relates to the business of insurance but the Third Circuit has held that it does not. *Compare Ford*, 145 F.3d at 611-12 *with Pallozzi*, 1999 WL 1079973 at *6, *and* App. 14a.

10. Even were it proper in a case considering a statute that *does* specifically relate to the business of insurance to go further and ask whether application of the statute would impair state law, the answer here is plainly "no." Mutual stipulated that its AIDS caps do not comply with state law, and has not identified any state's law that would allow such caps. *See* Petition at 29.

CONCLUSION

For these reasons and those stated in the Petition, this Court should issue a writ of *certiorari* to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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